

228996

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Finance Docket No. 35380**

ENTERED  
Office of Proceedings

MAR 15 2011

Part of  
Public Record

**SAN LUIS & RIO GRANDE RAILROAD  
PETITION FOR A DECLARATORY ORDER  
COMMENTS AND PETITION FOR LEAVE TO INTERENE  
OF  
THE AMERICAN SHORT LINE AND REGIONAL  
RAILROAD ASSOCIATION**

---

Submitted by

Keith T. Borman  
Vice President & General Counsel  
American Short Line and Regional  
Railroad Association  
Suite 7020  
50 F Street, N.W.  
Washington, D.C. 20001-1564  
Telephone: 202-628-4500  
[kborman@aslrra.org](mailto:kborman@aslrra.org)

Dated: March 15, 2010

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Finance Docket No. 35380**

**SAN LUIS & RIO GRANDE RAILROAD  
PETITION FOR A DECLARATORY ORDER**

**COMMENTS AND PETITION FOR LEAVE TO INTERENE  
OF  
THE AMERICAN SHORT LINE AND REGIONAL  
RAILROAD ASSOCIATION**

**INTRODUCTION**

Pursuant to 49 CFR 1112.4 the American Short Line and Regional Railroad Association (“ASLRRA”) seeks to intervene in the above-captioned proceeding and submit comments supporting the Petition for a Declaratory Order filed by its member the San Luis & Rio Grande Railroad (“SLRG”). ASLRRA submits that its intervention will not delay the Board’s proceeding or broaden the issues. This proceeding presents broad policy issues of tremendous concern to the short line railroad industry.

## COMMENTS

By Petition filed May 25, 2010, ASLRRA member SLRG had asked the Board for a ruling that federal law preempts the application of a local land use law, the Conejos County Land Use Code (“CCLUC”) to a truck-to-rail transload facility it has constructed and desires to use at Antonito, Conejos County, CO. Conejos County and some of its residents oppose this action. The County is trying to use the CCLUC’s provisions to prevent the railroad from using that facility to handle interstate rail shipments. What distinguishes this case from the many other disputes between railroads and communities involving preemption of state or local permitting, land use, and environmental laws is that this is the one of the first cases brought under the recently enacted Clean Railroads Act (“CRA”) amendments to the I.C.C. Termination Act and the *first* involving the meaning of the term “original shipping container” under the CRA. More specifically, this proceeding presents the question of whether the sealed bags and containers used to transport the commodity in question, contaminated dirt, qualify for the “original shipping container” exemption under the CRA at 49 U.S.C. 10908(e)(1)(H)(i).

After the Board instituted a proceeding back on August 12, 2010, numerous parties filed written comments. The Board then conducted a field hearing on February 17, 2010, in Antonito, Conejos County, CO, and solicited additional comments from the public and reply comments from SLRG. ASLRRRA, which represents approximately 455 class II and class III railroads in the United States, Canada and Mexico as well as numerous suppliers and contractors to the short line and regional railroad industry, seeks to intervene here on behalf of member SLRG. ASLRRRA believes this proceeding presents issues of particular significance to the short line railroad community given short lines' many efforts to develop and handle this type of traffic. Granting intervention will neither delay this proceeding nor broaden the issues. ASLRRRA will not present any evidence or argument specific to this transaction. Rather ASLRRRA wishes to inform the Board of the important role that short lines play in handling traffic addressed in the CRA and highlighting the broad policy issues involving this traffic.

As a preliminary matter, short line and regional railroads have been at the forefront of much of the litigation involving federal preemption of inconsistent state and local laws involving permitting, land use, and local environmental codes. *See, e.g., Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order*, STB FD No. 35057 (STB served Feb. 1,

2008 & Sept. 26, 2008); Borough of Riverdale-Petition for Declaratory Order, STB Finance Docket No. 35299, STB served Aug. 5, 2010; and Green Mountain Railroad Corporation v. Vermont, 404 F.3d 638 (2005)(Green Mountain). A substantial number of these proceedings have involved the construction and operation of truck-to-rail transfer facilities including some entailing commodities that could be considered “waste” as well as construction and demolition debris (“c&d”). Much of this litigation seems to fall disproportionately on short line and regional railroads for several reasons. First, as many smaller railroads do not have the good fortune of serving major traffic generators such as coal mines, power plants, automobile factories, steel mills, or intermodal ports, they have to use their ingenuity to develop additional traffic from sources over and beyond those customers directly located along their track. Many of these efforts entail persuading off-line customers who would otherwise use motor carriers to truck their freight to a transfer point, commonly called a transload facility for further movement rail (or vice versa). Concerned about traffic congestion, zoning requirements, and other matters related to these facilities, local communities have tried to use a variety of laws to limit railroads’ use of these transload facilities. They would rather see the traffic continue to move by highway, especially by highways bypassing their communities.

Second, the movement of trash and c&d has been a major traffic source for short line railroads using these transload facilities. Generally, the construction of facilities to handle this traffic does not entail great expense. And the amount of traffic is almost unlimited, particularly in the northeastern part of the country. While class I railroads are happy to handle this traffic, they prefer to see someone else consolidate this cargo into a “package,” a container, and present it to them. Because of their strong ties to local industry and economic development entities, short line railroads are uniquely able to find these opportunities.

Third, because smaller railroads struggle with more financial challenges than their class I counterparts, short lines need the revenues generated by waste traffic and c&d to help them attain and maintain profitability. SLRG admits in its comments that the traffic generated by its customer, *EnergySolutions*, will be very helpful in enabling it to achieve profitability thereby preserving service for a wide variety of other customers.

Finally, in many cases short line railroads constitute the “last mile” in rail transportation. They represent the critical link between the class I carrier moving goods major distances and the ultimate customer. This is especially so in rural areas like southern Colorado. In fact, there are whole states or

major portions of the states<sup>1</sup> that would *lack* rail service completely but for short line railroads.

Regarding the specific issue at hand, ASLRRA believes that when Congress drafted the CRA, it intended for the term “original shipping container” to be strictly construed. So long as the commodity was placed in a sealed bag or container at the point of origin, transported in those sealed bags or containers to the originating railroad, and then delivered in sealed bags or containers to the ultimate receiver, the transload facility is exempt from the provisions of the CRA and from state or local permitting requirements. As such, the Board should treat facilities handling waste traffic such as that SLRG proposes to transport no differently than facilities handling other rail shipments. As the U.S. Court of Appeals for the Second Circuit held in Green Mountain, local land use codes such as those involved here present an undue interference with interstate commerce, mandate a time-consuming preconstruction permitting process allowing the local body to delay construction almost indefinitely, and entail regulations that have been applied in a discretionary and subjective manner.

---

<sup>1</sup> Among them, Maine, New Hampshire, Vermont, and the upper portion of Michigan’s Lower Peninsula.

Respectfully submitted,

American Short Line and Regional Railroad Association

*Keith T. Borman*

---

By: Keith T. Borman  
Vice President & General Counsel  
American Short Line and Regional Railroad Association  
Suite 7020  
50 F Street N.W.  
Washington, D.C. 20001-1564  
Telephone 202-628-4500  
[kborman@aslrra.org](mailto:kborman@aslrra.org)

Dated: March 15, 2010



**CERTIFICATE OF SERVICE**

I, John D. Heffner, hereby certifies that I mailed a copy of the foregoing comments of the American Short Line and Regional Railroad Association by first class mail to all parties on the Board's service list in the above-captioned proceeding this 16<sup>th</sup> day of March 2011.

John D. Heffner